

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request of Cellular Communications of)
Puerto Rico, Inc. to Hold an Auction To)
License Cellular RSA No. 727A,)
Ceiba, Puerto Rico)

Petition for Rulemaking Re: RSAs)
332A Arkansas 9 - Polk)
370A Florida 11 - Monroe)
492A Minnesota 11 - Goodhue)
582A North Dakota 3 - Barnes)
615A Pennsylvania 4 - Bradford)
and other Cellular Markets for which)
Applications Were Filed Prior to July 26, 1993)

To: Chief, Commercial Wireless Division

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Office of Secretary

RM-8897

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**Initial Comments of
JMC Enterprises
SDK Enterprises
Donald J. Kunkle
Formula I Cellular**

William L. Fishman
Jane B. Maxwell

Sullivan & Worcester LLP
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036
(202) 775-8190

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Appendix A

SUMMARY

In 1988 JMC Enterprises, SDK Enterprises, Donald J. Kunkle and Formula I Cellular (the "Commenters") each filed one or more applications at the FCC for the six nonwireline cellular RSA markets which the Commission by Lottery Notice dated July 12, 1996 proposed to relottery upon the disqualification of the initially selected winning applicant. The staff postponed the lottery prior to its scheduled date, and on October 24, 1996 issued a Public Notice inviting comment on a Petition for Declaratory Ruling or Rulemaking filed by Cellular Communications of Puerto Rico, Inc. ("CCPR"). CCPR's Petition requested that the Commission use an auction, rather than a lottery, to license RSA No. 727A, Ceiba, PR (one of the six markets included in the Lottery Notice). The October 24th Public Notice indicated that CCPR's Petition would be treated as a petition for rulemaking on the question whether auctions should be used to license the Ceiba RSA and all other similarly situated cellular markets in which applications were filed prior to July 26, 1993 and the original tentative lottery selectee was disqualified.

Commenters oppose CCPR's request that the Ceiba, PR RSA be auctioned, as well as the use of an auction in the other five RSA's listed in the July 12th Lottery Notice and in all similarly situated cellular markets in which applications were filed before July 26, 1993 and the original lottery winner is disqualified. Cancellation of the proposed relottery and use of an auction in these RSA's would be inconsistent with Congressional intent, less efficient than a lottery, grossly unfair to the existing RSA applicants, unlawful retroactive rulemaking, inconsistent with the FCC's prior treatment of similarly-situated applications, and contrary to the public interest.

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To: Chief, Commercial Wireless Division

**Initial Comments of
JMC Enterprises
SDK Enterprises
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Formula I Cellular**

JMC Enterprises, SDK Enterprises, Donald J. Kunkle and Formula I Cellular (the "Commenters"), by the undersigned counsel, hereby file their joint Initial Comments in response to the Commission's Public Notice of October 24, 1996, DA 96-1685.¹ Each of the Commenters filed applications in 1988 for one or more nonwireline cellular RSA's

¹ Each of the parties on whose behalf these Initial Comments are being filed is fully independent of the other parties. The parties have not formed any entity for the purpose of these Comments and file jointly only to minimize the amount of paper presented to the Commission. Each individually reserves its rights to take such further action in connection with this proceeding as it individually deems necessary.

which the Commission proposed to relottery upon the disqualification of the initially selected winning applicant. *See Lottery Notice* of July 12, 1996, announcing the relottery of the six above-captioned named RSA's.² Each is opposed both to the proposal of Cellular Communications of Puerto Rico, Inc. ("CCPR") to auction RSA No. 727A³ and to auctioning of the other five RSA's included in the Commission's earlier decision to conduct a second lottery, as well as to auctioning of other similarly situated cellular markets. To cancel the proposed relottery and substitute an auction for these RSA's would be grossly unfair to the original RSA applicants, inconsistent with numerous other Commission determinations in similar circumstances, contrary to the public interest and unlawful.

I. Background

The brief factual background of this matter is set forth in the October 24th *Public Notice* which invites Comments in this matter and there is no need to recapitulate that history here. In *Algreg Cellular Engineering*, 6 FCC Rcd 2921 (CCB 1991), the Commission set for hearing applications filed by the original lottery selectees in three of the six RSA's here in issue. Those applications were subsequently denied in *Algreg Cellular Engineering*, 7 FCC Rcd 8686 (1992), and dismissed thereafter.⁴ No

² Lottery Notice, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in which Previous Winner was Defective," Mimeo No. 63896, released July 12, 1996. A list of the applications filed by Commenters in the named six RSA markets is attached hereto as Appendix A.

³ Petition of CCPR for Declaratory Ruling or, in the Alternative, for Rulemaking ("Pet."), filed on September 9, 1996.

⁴ *Algreg Cellular Engineering*, 8 FCC Rcd 2226 (Rev. Bd. 1993) and 9 FCC Rcd (continued...)

information is provided as to the history of the remaining three RSA's other than that the original lottery winners were disqualified. An affiliate of CCPR apparently has built and is operating the Ceiba, PR RSA on a temporary basis, relying on interim operating authority ("IOA")⁵ (Pet. at 4). CCPR understandably does not want to be compelled to negotiate with the lottery winner in the Ceiba RSA.⁶ Instead, it urges the Commission to auction the Ceiba, PR RSA. The Chief, Commercial Wireless Division, now seeks comment (see October 24th *Public Notice* at 2) on the question whether the Ceiba, PR RSA and all other similarly situated cellular markets, in which applications were filed prior to July 26, 1993 and the original tentative lottery selectee was disqualified, should be auctioned instead of being awarded by lottery.

II. The Six RSA's Should Be Awarded By Lottery, As Originally Intended

The July 12, 1996 Lottery Notice (at 1) proposed to award the six named RSA's by lottery, relying on the Commission's earlier decision to use lottery procedures for cellular unserved area applications filed before July 26, 1993. *Implementation of Section 309(j) of the Communications Act - Competitive Bidding (Unserved Areas)*, 9 FCC Rcd

⁴ (...continued)

5098 (Rev. Bd. 1994), *recon. denied*, 9 FCC Rcd 6753 (Rev. Bd. 1994).

⁵ With respect to interim operating authority generally, see Sections 4(i) and 309(c) of the Communications Act; see also, e.g., Portland Cellular Partnership, FCC 96-449, released on November 21, 1996, para. 42.

⁶ The Commission's July 12, 1996 Lottery Notice lists 491 applicants for the Ceiba, PR RSA. CCPR is not among them.

7387, 7390 (1994).⁷ In *Unserved Areas*, the Commission observed that compelling public interest justifications exist for using lotteries rather than auctions for most services for which applications were filed prior to July 26, 1993. 9 FCC Rcd at 7390. The rationale relied upon in that proceeding is equally applicable to the present circumstances.

a. A Lottery Would Be Consistent With Congressional Intent

As *Unserved Areas* notes, Congress recognized in crafting section 309(j) of the Act that there are strong equities in grandfathering the existing lottery procedures for applicants who filed prior to July 26, 1993. 9 FCC Rcd at 7391. Certainly the facts here underscore the fairness of retaining the lottery procedure. Commenters filed their applications in 1988 and are in no way responsible for the Commission's 8 year delay in awarding the six named RSA's in issue. Indeed, the delay has undoubtedly severely disadvantaged many of the initial RSA applicants, many of which were presumably formed in response to the Commission's policy of awarding RSA's by lottery.

b. A Lottery Would Be More Speedy and Efficient Than An Auction

In its efficiency analysis set forth in *Unserved Areas*, the Commission noted that completing an auction could take longer than completing a lottery and could involve other factors creating administrative confusion and attendant delays, including the time needed to accept new applications from new parties, the time to return existing

⁷ See also Section 22.959 of the Commission's rules, which specifies that pending applications for authority to operate the first cellular system on a channel block in an RSA market continue to be processed under the processing rules which were in effect when those applications were filed, unless the FCC determines otherwise in a particular case.

applications of those not electing to participate in an auction and to refund their application processing fees, and the time for existing applicants who so choose to refile under the auction process. 9 FCC Rcd at 7392. The same efficiency analysis is applicable here: in the six named RSA markets at issue, the lottery technique would take only a few hours to complete, whereas choosing tailored rules for the auction, providing an opportunity for auction applications to be filed, for the auction to be run, and for other auction complexities to be resolved, would require far longer. In an analogous context, *i.e.*, the question whether to auction pending MDS applications filed years before the adoption of section 309(j) of the Act, the Commission elected to retain the lottery process, in part because a lottery could be scheduled almost immediately whereas an auction would require many months before it could even begin. *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9589, 9632, *recon. granted in part*, 10 FCC Rcd 13821 (1995). Given the extremely long delay in establishing initial long term licensees on the nonwireline channel block in these RSA's, the public interest requires that the selection process be accelerated so far as possible.

c. There Are Strong Equities in Favor of the Lottery Approach

The Commission noted in *Unserved Areas* that many of the approximately 10,900 unserved area applications filed before July 26, 1993 had been on file for more than a year, that the applicants' business plans did not take into account additional expenditures which would be incurred in a competitive process, and that administrative upheaval at

considerable cost would result if the existing applicants had to clarify their intentions to participate in an auction and either submit the requisite bidding information or receive a refund of their application processing fees. 9 FCC Rcd at 7388, 7391-92. The Commenters herein filed applications for one or more of the six subject RSA's in 1988 along with hundreds of other applicants.⁸ Commenters incurred substantial organizational and application expenses and per market filing fees in reliance on the Commission's announced intention to award such markets by lottery. Commenters, of course, do not know the details of the identity or the circumstances of the hundreds of existing RSA applicants who would be impacted adversely by the use of an auction. But at a minimum, switching from the anticipated lottery approach to auctions would frustrate many hundreds of filers' reasonable expectations that their filings would be processed in a lottery, and would retroactively alter the principal assumption on the basis of which hundreds of applicants based their business plans and may have expended millions of dollars.⁹ Auction requirements would undoubtedly foreclose meaningful participation by many, if not most, of those applicants. *See MDS and ITFS*, concluding that in such circumstances the lottery approach is preferable:

In examining the equities and administrative costs at stake here, and based on the record before us, we believe that the public interest would be

⁸ The July 12, 1996 Lottery Notice lists a total of 3,668 applications filed in the six named RSA markets.

⁹ In the six RSA's being considered for auction, the filing fee per market was \$200. If, in addition, each of the 3668 applicants incurred an average of \$200 per market for preparation of its application, the total sum expended, without consideration of organizational expenses, commitments of time, or opportunity costs, would be \$1,467,200. Undoubtedly taking account fairly of all expenses would raise this total substantially.

served by using a lottery to dispose of the relatively few remaining previously filed MDS applications for the handful of locations at issue. Indeed, we believe this situation presents facts that are precisely the type that warranted the grant of discretion to the Commission on this point. Specifically, with regard to equitable considerations, we note that most of these MDS applications on file have been pending for over four years due to the aforementioned processing delays, which were not the fault of the applicants. Particularly given this lengthy delay, we believe it would be unfair to require these previously filed applicants to refile their applications and participate in an auction for BTA service areas, as they submitted their applications with the expectation of participating in a lottery for a site-specific conditional station license.

10 FCC Rcd at 9631 (footnotes omitted).

Given the strong equities favoring the existing applicants, any decision to auction these (and similarly situated RSA's) would require a very substantial justification. CCPR offers no such justification. It elected, as it has every right to do, to proceed strictly at its own risk to file for interim operating authority, rather than to file an application for a permanent authorization. The rules governing IOA grants are explicit and unequivocal: no holder is entitled to any equities or preferences whatsoever. See, e.g., Public Notice, Report No. CL-96-36, released on March 8, 1996, setting forth at pp. 3-4 the conditions of grant of an application for interim operating authority in another nonwireline RSA. It would be a gross violation of the spirit of the interim operating rules to ask the Commission to adopt a wholly new and completely different licensing scheme in order to accommodate CCPR's business judgments and circumstances.

CCPR argues that the rationale adopted in *Unserved Areas* for foregoing auctions is inapplicable. Pet. at 3. In *Unserved Areas* the Commission concluded that the value of the unserved areas was questionable due to their varying geographic size and population

coverage, which would presumably affect bid size. 9 FCC Rcd at 7392. CCPR speculates, with little evidence, that these RSA's will be more valuable than unserved areas.¹⁰ Pet. at 4. The simple fact is that there is no way to determine whether the RSA's in issue are more or less valuable than the unserved areas.¹¹ Even if they were, that alone would not be sufficient reason to auction them. Less than a year ago two members of the Senate wrote to Chairman Hundt to note that Congressional intent as expressed in Section 309(j) of the Act is that "applicants who have completed the application process [should not] subsequently be exposed to having to compete for that spectrum in auctions."¹²

Commenters recognize that many years have passed since the subject RSA's were opened for filing. The delay in instituting service, however, is in no way attributable to the existing applicants who now seek to have the Commission, albeit belatedly, fulfill its original commitment. On the contrary, it is the Commission itself which has consumed the intervening years in conducting the first lotteries, selecting the winning candidates, disqualifying the winning candidates, initiating the administrative process for holding a

¹⁰ There is wide variation in the value of unserved areas and among the remaining unlicensed RSA's.

¹¹ CCPR also speculates that the pending applicants will not build out and operate the RSA's. Pet. at 5-6. There is no record basis for such an assertion. See MDS and ITFS, where the Commission rejected similar arguments with respect to pending MDS applicants as wholly unsubstantiated in the record before the Commission. 10 FCC Rcd at 9632. Among the RSA cellular markets won at lottery by the Commenters filing this submission, three were built out and one Commenter continues to operate its RSA system.

¹² Letter of Senators Pressler and Daschle to Chairman Hundt dated February 9, 1996, commenting on the 39 Ghz Notice of Proposed Rulemaking and Order, FCC 95-500, *rel.* December 15, 1995.

second round of lotteries, and now examining whether to hold auctions. Very similar considerations prompted the Commission in *MDS and ITFS* to opt for a lottery. 10 FCC Rcd at 9631-32.

In this context, it is inaccurate and misleading for CCPR to claim that the waiting applicants have already lost the lottery and merely want a second bite of the apple. (Pet. at 5). On the contrary, the lottery has been “lost” only when the Commission has chosen an applicant who meets the preestablished eligibility criteria, and whose application is deemed by the Commission to be grantable and is granted. As a matter of simple logic, one cannot “lose” a lottery to an unqualified applicant, and that is exactly the issue here: these markets are open for new grants because the applicants previously selected were deemed deficient. Stated differently, the initial process has never been completed under the rules then in effect and upon which applicants relied, and applicants seek not a second bite of the apple, but a first bite to compete with other timely-filed applicants. But even if the relottery were a second chance, the equities still favor the original applicants. CCPR itself appears not to have chosen to file an application for RSA 727A but now seeks a second chance to win the license. As between any “second biters”, those who acted first in good faith reliance and who have been waiting some eight years for a chance to win an RSA license should prevail.

III. Adoption of Auction Techniques for Prior-Filed Applications Would Constitute Unlawful Retroactive Rulemaking

Applying the Commission’s section 309(j) auction authority to applications filed five years prior to adoption of that section, and eight years prior to the decision to auction them, is not only inequitable, but unlawful. That auctioning applications filed in

contemplation of a lottery would be retroactive is indisputable; the effect of the new rule would be to adversely affect reasonable reliance interests of applicants who incurred expenses to participate in a lottery. Only recently the D.C. Circuit, in *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1407 (D.C. Cir. 1996), reminded the Commission that it must carefully consider applicants' reliance claims.

The law does not favor retroactivity. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471 (1988). In *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 n.12, 104 S.Ct. 2218, 2224 n.12 (1984), the Supreme Court observed that "an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests," citing, *inter alia*, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295, 94 S.Ct. 1757, 1772 (1974), *Atchison T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, 93 S.Ct. 2367, 2374-75 (1973) (plurality opinion), and *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580 (1947).

In the D.C. Circuit an agency proposing to make retroactive alterations in its rules must persuade the reviewing court that the benefit of such retroactivity outweighs the undesirability of relying on retroactive rules. In *Retail, Wholesale and Dept. Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972), the D.C. Circuit set forth a five part test for determinations of reasonableness: (a) Is the case one of first impression; (b) Is the new rule an abrupt departure from well established prior practice, or does it just fill in a void in an unsettled area of law; (c) The extent of reliance on the prior rule of the party challenging the retroactivity; (d) The degree of burden which a retroactive order would

have on the party challenging it; and (e) The public interest in applying a new rule despite the reliance of a party on the old standard. *Id.* at 390. While the D.C. Circuit has carefully circumscribed the *Retail, Wholesale* criteria to cases of adjudication in *Motion Picture Association of America, Inc. v. Oman*, 969 F. 2d 1154, 1158 (D.C. Cir. 1992), it would appear that an essentially identical test applies to retroactivity in rulemakings. *See Sierra Club v. EPA*, 719 F.2d 436, 467 (D.C. Cir. 1983), *cert. denied sub nom. Alabama Power Co. v. Sierra Club*, 468 U.S. 1204 (1984); *see also McElroy Electronics Corp. v. FCC*, 990 F. 2d 1351, 1365 (D.C. Cir. 1993) (FCC must provide reasoned justification reflecting its balancing of all relevant interests involved in retroactivity decisions). Indeed, the lawfulness of retroactive rulemaking is often measured by reference to the standards set forth in *Chenery* and *Retail, Wholesale*. *See, e.g., Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987).

When applied to the present circumstances, these criteria require that the Commission sustain its initial intent to use a lottery. As to the "case of first impression" test, this would be, to Commenters' knowledge, the first instance in which the Commission has decided to auction RSA applications filed prior to July 26, 1993. To auction would also contravene the second criterion, by constituting an abrupt departure from prior practice. The reliance interest of the applicants is clear and unchallenged. The burden on such applicants is substantial since the surviving applicants would have to devote substantial time and energy to raising the funds required to bid realistically in an auction -- a task they never contemplated and may not have been initially constituted to be well suited to do. Similarly, with respect to the public interest criterion, other than

raising funds for the public fisc, a policy goal which is forbidden in choosing to use auctions by section 309(j)(7)(A) of the Act, the public interest is in rapid selection of a licensee, and that goal, as demonstrated above, is better served by a lottery than by an auction. In sum, the D.C. Circuit's tests support retention of the lottery approach to the selection of RSA licensees whose applications were filed before July 26, 1993.

The D.C. Circuit has observed that courts have long hesitated to permit the "extraordinary step" of retroactive rulemaking and have noted its troubling nature. "When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief." Accordingly judicial review of allegations of retroactivity requires a higher standard of justification than is generally the case. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-46 (D.C. Cir. 1986).

The Commission itself has often recognized the inequity of changing the groundrules after applicants have filed on the basis of the rules previously in effect. *See, e.g., Unserved Areas*, 9 FCC Rcd at 7391-92; *MDS and ITFS*, 10 FCC Rcd at 9631; and *Anchor Broadcasting*, 7 FCC Rcd 4566, 4568 (1992), in which the Commission reconsidered the extent to which the "integration" factor was relevant in comparative broadcast hearings. It decided that any new policy should not be applied to hearings already in progress since "applicants in hearing relied on the 1965 Policy Statement in formulating their applications and have incurred significant expenses litigating proposals that potentially could be rendered inferior by a drastically new policy. We do not believe that this result would be justified under the circumstances here." (citation omitted). *See*

also *Fox Television Stations, Inc. (FTS II)*, 78 RR 2d 1294, 1299-1301 (1995) (license renewed despite noncompliance with alien ownership benchmark, due to equitable considerations including licensee's reasonable reliance on its understanding of the law and on past FCC action); *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987), *cert. den.*, 490 U.S. 1039 (1989) (under certain circumstances an agency may be prevented from applying a new policy retroactively to parties who detrimentally relied on the previous policy); and *RKO General, Inc. v. FCC*, 670 F.2d 215, 223-24 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) (agency cannot apply new policy retroactively to prior conduct).

IV. Using Auction Techniques to Award Pre-1993 RSA Applications Would Be Inconsistent With Prior Treatment of Similarly Situated Applications

As referenced above, the Commission has previously decided to process unserved area cellular applications filed before July 26, 1993, as well as MDS and ITFS applications filed prior to that date, by using the lottery regime which was in effect when the applications were filed. To treat differently the instant RSA applications and all others filed before July 26, 1993 would violate one of the most fundamental rules of administrative action, i.e. that similarly situated applications must be treated alike. *See, e.g., Unserved Areas*, 9 FCC Rcd at 7392; *Adams Telcom, Inc. v. FCC*, 38 F.3d 576, 581 (D.C. Cir.1994); *McElroy Electronics Corp. v. FCC*, 990 F.2d at 1365-66; *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir.1965); and *Ramon Rodriguez & Associates*, 3 FCC Rcd 407, 408 (1988). Given the unusual equities of the instant matter, it is all the

more important that applicants be treated fairly in comparison with other similarly situated applicants.

For the reasons above the Commenters respectfully urge the Commission to exercise its discretion to proceed as initially intended and conduct a relottery for the subject named RSA's, and for all other RSA's in which applications were filed prior to July 26, 1993 and in which the original lottery winner is disqualified.

Respectfully submitted,

JMC ENTERPRISES, INC.

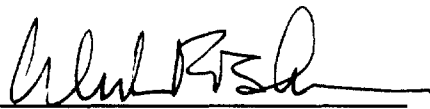
SDK ENTERPRISES

DONALD J. KUNKLE


FORMULA I CELLULAR

Date: November 25, 1996

By:


William L. Fishman

By:


Jane B. Maxwell

Their Counsel
Sullivan & Worcester LLP
1025 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036
(202) 775-8190

APPENDIX A
Applications Filed by Commenters
in RSA Markets Listed in July 12, 1996 Lottery Notice

<u>Commenter</u>	<u>RSA 727A</u> <u>(PR 5)</u>	<u>RSA 332A</u> <u>(AR 9)</u>	<u>RSA 582A</u> <u>(ND 3)</u>	<u>RSA 370A</u> <u>(FL 11)</u>	<u>RSA 615A</u> <u>(PA 4)</u>	<u>RSA 492A</u> <u>(MN 11)</u>
JMC Enterprises	# 309	# 489	# 394	# 556	# 242	# 448
SDK Enterprises						# 467
Donald J. Kunkle	# 320	# 549	# 419	# 663	# 320	# 449
Formula I Cellular	# 318	# 543	# 407	# 654	# 330	# 434

CERTIFICATE OF SERVICE

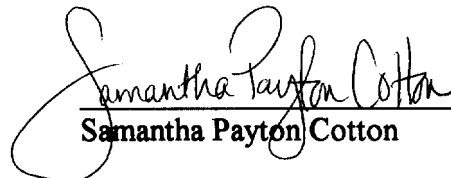
I hereby certify that a copy of the foregoing Initial Comments of JMC Enterprises, SDK Enterprises, Donald J. Kunkle and Formula I Cellular was sent by U.S. mail postage prepaid this 25th day of November, 1996 to the following:

Eric J. Bash, Esq.
Federal Communications Commission
Wireless Telecommunications Bureau
Commercial Wireless Division, Legal Branch
2025 M Street, N.W.
Room 7130
Washington, DC 20554

Charles D. Ferris, Esq.
Sara F. Seidman, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, DC 20004

Counsel to Cellular Communications of Puerto Rico, Inc.

ITS
2100 M Street, N.W.
Suite 140
Washington, DC 20037



Samantha Payton Cotton